RECORD AND BRIEFS

APR 21 2017

No. 16-6855

In The
Supreme Court of the United States

MARION WILSON,

Petitioner,

v.

ERIC SELLERS, Warden,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

BRIEF FOR RESPONDENT

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CAPITAL CASE
QUESTION PRESENTED

A federal court sitting in habeas reviews the last state-court decision on the merits of a petitioner's claims under the deferential standard supplied by 28 U.S.C. § 2254(d). *Harrington v. Richter* explained that courts must apply this standard even when the state court does not explain its decision, because § 2254(d) requires the federal habeas court to review a state court's "decision," not its reasoning. In such a case, the petitioner still must show that no reasonable basis could have supported the state court's decision. The question presented is:

If the last state court's summary merits decision was preceded by a lower state court's opinion, is a federal habeas court required to abandon *Richter*, "look through" the last state-court merits decision, and apply § 2254(d)'s standard only to the lower state court's reasoning?

TABLE OF CONTENTS

Page

Question Presented i

Table of Contents ii

Table of Authorities v

Statutory Provisions Involved 1

Introduction 1

Statement 3

Summary of Argument 15

Argument 20

Federal habeas courts are not required to "look through" a later summary state-court merits decision to review only a lower state court's reasoning 20

A. A federal habeas court reviews the last state-court decision on the merits under § 2254(d), even if it is not accompanied by a statement of reasons 20

B. The last state-court merits decision is the decision under review whether or not a lower state court issued an opinion 24

1. AEDPA's text requires review of the last state-court merits decision, not a lower state court's reasoning 26

2. A "look through" requirement would impose an impermissible opinion-writing standard 31

TABLE OF CONTENTS—Continued

Page

3. Limiting review to only a lower state court's reasoning would put federal courts back in the paternalistic relationship to state courts AEDPA was designed to end 33

C. There is no sound basis for presuming that a summary state-court merits decision silently incorporates a lower state court's specific reasoning 35

1. Wilson's presumption shows a disrespect for state judiciaries that is contrary to AEDPA's design 36

2. Federal courts, including this Court, do not assume summary affirmances adopt the opinion below 41

3. *Ylst*'s narrow presumption about state procedural bars does not support importing a lower state court's specific reasoning into the last state-court merits decision 43

D. This Court has not required "looking through" a later summary state-court merits decision to review only a lower state court's reasoning 50

E. Georgia's habeas procedures do not warrant a different approach to federal habeas review 55

TABLE OF CONTENTS—Continued

Page

1. The Georgia Supreme Court's summary denial of a certificate of probable cause must be reviewed under the approach demonstrated in *Richter* 55
2. This Court should not consider Wilson's new argument about the Georgia Supreme Court's "arguable merit" standard 59

Conclusion 61

TABLE OF AUTHORITIES

Page

CASES

Ake v. Oklahoma, 470 U.S. 68 (1985) 54

Anderson v. Celebrezze, 460 U.S. 780 (1983) 48

Bond v. Beard, 539 F.3d 256 (3d Cir. 2008).....53

Booher v. U.S. Postal Serv., 843 F.2d 943 (6th Cir. 1988) 41

Brumfield v. Cain, 135 S.Ct. 2269 (2015) 14, 50

Burt v. Titlow, 134 S.Ct. 10 (2013) 38

Cannedy v. Adams, 706 F.3d 1148 (9th Cir. 2013)..... 47

Cannedy v. Adams, 733 F.3d 794 (9th Cir. 2013)....31, 46

Coleman v. Thompson, 501 U.S. 722 (1991)..... 31, 32, 44, 47

Comptroller of Treasury of Maryland v. Wynne, 135 S.Ct. 1787 (2015) 41

Cruz v. Miller, 255 F.3d 77 (2d Cir. 2001) 34

Cullen v. Pinholster, 563 U.S. 170 (2011)..... 20, 30, 38, 46, 47

Davila v. Davis, 137 S.Ct. 2058 (2017).....52

DeShong v. Seaboard Coast Line R.R. Co., 737 F.2d 1520 (11th Cir. 1984).....41

Diesel Mach., Inc. v. B.R. Lee Indus., Inc., 418 F.3d 820 (8th Cir. 2005).....41

Dretke v. Haley, 541 U.S. 386 (2004) 45

Dyer v. Bowlen, 465 F.3d 280 (6th Cir. 2006) 22

Edwards v. Scott, 218 F.3d 744 (5th Cir. 2000).....42

TABLE OF AUTHORITIES—Continued

Page

Eley v. Erickson, 712 F.3d 837 (3d Cir. 2013) 21

Felker v. Turpin, 518 U.S. 651 (1996) 45

Ferguson v. Sec'y, Fla. Dep't of Corr., 716 F.3d 1315 (11th Cir. 2013) 34

Foster v. Chatman, 136 S.Ct. 1737 (2016) ... 14, 24, 52, 59

Fusari v. Steinberg, 419 U.S. 379 (1975) 41

Georgia-Pac., LLC v. Fields, 748 S.E.2d 407 (Ga. 2013) 42

Greene v. Fisher, 565 U.S. 34 (2011) ..... *passim*

Grueninger v. Dir., Va. Dep't of Corr., 813 F.3d 517 (4th Cir. 2016) 52

Harrington v. Richter, 562 U.S. 86 (2011) ..... *passim*

Harris v. Reed, 489 U.S. 255 (1989) 44

Harris v. Stovall, 212 F.3d 940 (6th Cir. 2000) 23

Hennon v. Cooper, 109 F.3d 330 (7th Cir. 1997) 34

Hittson v. Chatman, 135 S.Ct. 2126 (2015) 49

Hooks v. Workman, 666 F.3d 715 (10th Cir. 2010) 34

Izumi Seimitsu Kogyo Kabushiki Kaisha v. U.S. Philips Corp., 510 U.S. 27 (1993) 60

Johnson v. Lee, 136 S.Ct. 1802 (2016) 32

Johnson v. Williams, 133 S.Ct. 1088 (2013) 14

Lint v. Prelesnik, 542 F. App'x 472 (6th Cir. 2013) 52

Lonchar v. Thomas, 517 U.S. 314 (1996) 45

Malone v. Clarke, 536 F.3d 54 (1st Cir. 2008) 53

TABLE OF AUTHORITIES—Continued

Page

Mandel v. Bradley, 432 U.S. 173 (1977) 41, 42

Martinez v. Hartley, 413 F. App'x 44 (10th Cir. 2011) 53

McQuiggin v. Perkins, 133 S.Ct. 1924 (2013).....45

McWilliams v. Dunn, 137 S.Ct. 1790 (2017).....53, 54

Murray v. Schriro, 745 F.3d 984 (9th Cir. 2014) 53

O'Sullivan v. Boerckel, 526 U.S. 838 (1999) 21

Pa. Dep't of Corr. v. Yeskey, 524 U.S. 206 (1998).....59

Pac. Gas & Elec. Co. v. State Energy Res. Conservation & Dev. Comm'n, 461 U.S. 190 (1983).....41

Porter v. McCollum, 558 U.S. 30 (2009).....29

Premo v. Moore, 562 U.S. 115 (2011) 14, 51

Rates Tech., Inc. v. Mediatrix Telecom, Inc., 688 F.3d 742 (Fed. Cir. 2012) 41

Rock v. Conway, 470 F. App'x 15 (2d Cir. 2012) 22

Rosario v. Ercole, 601 F.3d 118 (2d Cir. 2010).....53

Sears v. Upton, 561 U.S. 945 (2010) 52

State v. Martinez, 729 S.E.2d 390 (Ga. 2012).....57

Sullo & Bobbitt, P.L.L.C. v. Milner, 765 F.3d 388 (5th Cir. 2014).....42

Trainor v. Hernandez, 431 U.S. 434 (1977) 38

United States v. A 1985 Cadillac Fleetwood, VIN No. 1G6CB6989F4299723, 9 F.3d 109 (6th Cir. 1993) 42

TABLE OF AUTHORITIES—Continued

Page

United States v. Hershberger, 83 F.3d 434 (10th Cir. 1996) 42

Upton v. Parks, 664 S.E.2d 196 (Ga. 2008) 57

Virginia v. LeBlanc, 137 S.Ct. 1726 (2017) 53

Washington v. Hopson, 788 S.E.2d 362 (Ga. 2016) 57

Washington v. Roberts, 846 F.3d 1283 (10th Cir. 2017) 33

Whatley v. Terry, 668 S.E.2d 651 (Ga. 2008) 57

White v. Wheeler, 136 S.Ct. 456 (2015) 29

Williams v. Taylor, 529 U.S. 420 (2000) 31

Wilson v. Sellers, No. 17-5562 ..... 15, 60

Wilson v. Warden, No. 14-10681 (11th Cir. Sept. 21, 2015) 11

Wis. Dep't of Rev. v. William Wrigley, Jr., Co., 505 U.S. 214 (1992) 48

Woodford v. Visciotti, 537 U.S. 19 (2002) 29, 38

Woodfox v. Cain, 772 F.3d 358 (5th Cir. 2014) 52

Woods v. Donald, 135 S.Ct. 1372 (2015) 38, 50

Woods v. Etherton, 136 S.Ct. 1149 (2016) 51

Woolley v. Rednour, 702 F.3d 411 (7th Cir. 2012) 52

Worthington v. Roper, 631 F.3d 487 (8th Cir. 2011) 53

Wright v. Sec'y, Dep't of Corr., 278 F.3d 1245 (11th Cir. 2002) 26

TABLE OF AUTHORITIES—Continued

Page

Yee v. City of Escondido, Cal., 503 U.S. 519 (1992) 59

Ylst v. Nunnemaker, 501 U.S. 797 (1991) ..... *passim*

STATUTES

28 U.S.C. § 2254 ..... 8, 12, 44, 45, 49

28 U.S.C. § 2254(a) 21, 44

28 U.S.C. § 2254(b)(1) 21

28 U.S.C. § 2254(d) ..... *passim*

28 U.S.C. § 2254(d)(1) 10

Ga. Code Ann. § 9-14-43 55

Ga. Code Ann.§ 9-14-48 55

Ga. Code Ann.§ 9-14-49 55

Ga. Code Ann.§ 9-14-52 ..... 55, 58

RULES

S. Ct. R. 14.1(a) 59

Cal. R. of Ct. 8.500 51

Colorado App. R. 49 53

Ga. S.Ct. R. 36 55

Ill. S.Ct. R. 315(a) 53

La. Sup. Ct. R. X § 1(a) 51, 52

Mass. Gen. Laws Ann. ch. 211A, § 11 53

Mass. R. App. P. 27.1 53

Mich. Ct. R. 7.303(B) 51, 52

TABLE OF AUTHORITIES—Continued

Page

OTHER AUTHORITIES

Black's Law Dictionary (10th ed. 2014) 26

Garner's Dictionary of Legal Usage (3d ed. 2011).....26

STATUTORY PROVISIONS INVOLVED

28 U.S.C. § 2254(d) provides:

An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim—

(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or

(2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

INTRODUCTION

The Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) authorizes federal habeas relief if a petitioner can show that the "last state-court adjudication on the merits" resulted in a "decision" that was contrary to or unreasonably applied this Court's decisions, or unreasonably determined the facts. *Greene v. Fisher*, 565 U.S. 34, 39, 40 (2011); 28 U.S.C. § 2254(d). A "decision" is not the same thing as an "opinion," and the statutory text says nothing about reviewing one. A federal court must apply AEDPA's

deferential standard with or without an opinion explaining the last state court's merits decision. *See Harrington v. Richter*, 562 U.S. 86, 98 (2011).

There are many reasons to reject Wilson's position in this case, but in truth, just these points refute it. Wilson contends that if the last state-court merits decision is not accompanied by an opinion, a federal habeas court must "look through" it and apply § 2254(d)'s standard to a lower state court's "reasoned opinion" instead. But again: AEDPA requires the federal court to evaluate the *last* state-court merits *decision*. Nothing in AEDPA directs habeas review to a lower state court's opinion just because the last state-court merits decision is summary.

Instead, the federal court must apply AEDPA's standard to a summary decision as this Court demonstrated in *Richter*: ask whether any reasonable basis "could have supported . . . the state court's decision." *Id.* at 102. It is not enough to simply find no such reasonable basis in a lower state court's opinion without applying AEDPA's deferential standard to other arguments or theories that could have supported the summary decision. The habeas petitioner must show that "there was no reasonable basis" for the last state court to deny relief on the merits, not merely that a lower state court failed to supply one in an opinion. *Id.* Absent that showing, AEDPA does not authorize relief.

This faithful application of AEDPA's requirements does not mean that *Richter* "abrogated" *Ylst v. Nunnemaker*, as Wilson frames the question presented. Those

cases answered different questions and play different roles in federal habeas review. *Ylst* is a pre-AEDPA decision that shows how to discern whether a summary state-court decision is a merits decision reviewable in federal habeas proceedings or a rejection of a claim on state-law procedural grounds. *Richter* shows how to conduct substantive review of summary merits decisions under AEDPA. When summary state-court decisions are preceded by a lower state-court opinion, federal habeas courts first apply *Ylst* to determine whether the last state-court decision is a reviewable decision "on the merits" of the federal claim. If it is, courts then must apply the approach required by AEDPA and *Richter* to review the last state-court decision on the merits. Properly understood, *Richter* and *Ylst* work in concert, not in conflict.

In this case, the *en banc* court of appeals properly identified the Supreme Court of Georgia's summary denial of Wilson's certificate of probable cause as the last state-court adjudication on the merits of Wilson's claim. Then, consistent with AEDPA and *Richter*, the court of appeals reviewed that decision under AEDPA's deferential standard. Accordingly, this Court should affirm the judgment below.

STATEMENT

1. On the night of March 28, 1996, Donovan Parks drove to Wal-Mart to buy cat food. J.A. 6. He parked his car in the fire lane in front of the store and

went inside. *Id.* Two men, Marion Wilson and Robert Butts, came up behind him at the checkout line and then approached Parks after he got back to his car, where they asked him for a ride. *Id.* They got in Parks's car. *Id.* Minutes later, Parks's body was found lying face down on a residential street. *Id.*

Officers arrested Wilson. *Id.* Wilson told officers that Butts shot Parks and then, after trying but failing to find a "chop shop" to dispose of the car, he and Butts purchased gasoline cans, drove Parks's car to Macon, Georgia, and set the car on fire. J.A. 240. Officers later searched Wilson's residence and found a sawed-off shotgun loaded with the type of shells used to kill Parks. *Id.*

2. Two attorneys with "extensive criminal experience," Thomas O'Donnell, Jr. and Jon Philip Carr, were appointed to represent Wilson at trial. J.A. 48, 240. They argued in his defense that Wilson was merely present during the crimes, but a jury convicted Wilson of malice murder, felony murder, armed robbery, hijacking a motor vehicle, possession of a firearm during the commission of a crime, and possession of a sawed-off shotgun. J.A. 240.

During sentencing, defense counsel argued against a death sentence for Wilson and presented six witnesses. J.A. 151, 241. Among other things, counsel presented evidence that Butts had confessed to other inmates that he, not Wilson, was the triggerman. J.A. 241. They also presented testimony from Wilson's mother and from Dr. Kohanski, a forensic psychiatrist

who provided a "social history" based mostly on records obtained by trial counsel. J.A. 152, 241. According to that testimony, Wilson's early childhood was marked by severe and frequent respiratory infections. J.A. 66. Then, as early as first grade, aggressive and inappropriate behavior led his school to conduct a psychological assessment. J.A. 152. Dr. Kohanski testified that his school records also showed that his home life was "extraordinarily chaotic." *Id.* She also testified that drug use and violence in the home were common; for example, at age six or seven, Wilson saw one of his mother's particularly "dangerous" boyfriends put a gun to her head, and this "apparently was not an uncommon event." J.A. 153. Dr. Kohanski also told the jury Wilson grew up largely unsupervised and was living on his own, on the street, by age nine or ten, and that he experienced "considerable conflict" in his neighborhood because he was biracial. J.A. 152-53. The psychologist opined that Wilson's "lack of family guidance led him to associate with a gang." J.A. 153.

The prosecution then presented evidence of Wilson's extensive criminal history, violence, and gang affiliation and activity. J.A. 144-50, 242-43, 255-61. That evidence showed that Wilson started committing serious felonies by age twelve, when he and two other boys started a fire in a vacant apartment unit. J.A. 256. At twelve or thirteen, he threatened to kill an elderly woman and her son. *Id.* At fifteen, he shot a "migrant worker" in the buttocks because he "wanted to see what it felt like to shoot somebody," and he attacked a worker at the youth development center where he was

placed after the shooting. J.A. 256-57. When he was sixteen, Wilson attacked a boy twice at school; shot and killed a neighbor's small dog "for no apparent reason"; and was charged with possession of crack cocaine with intent to distribute. J.A. 257-58. Just days before his seventeenth birthday, Wilson shot at a man five times while the man was sitting in his truck, hitting him in the head and leaving a bullet lodged in his spine. J.A. 258. And soon after his release from a youth detention center at age eighteen, officers caught Wilson leading a group of people shouting at college students one night in a parking lot. J.A. 259. When an officer tried to arrest him, Wilson charged another officer, tried to grab his handgun, and fought until he was pepper-sprayed. *Id.* Wilson pleaded guilty to felony obstruction. *Id.*

After the evidence was presented at sentencing, the jury deliberated for less than two hours and recommended the death sentence for malice murder. J.A. 5, 155. The Georgia Supreme Court affirmed Wilson's convictions and sentence. J.A. 5-29.

3. Wilson petitioned for a writ of habeas corpus in the Superior Court of Butts County, Georgia. J.A. 30. Among other claims, he argued that his trial counsel were ineffective because they failed to adequately investigate his background and present sufficient mitigation evidence during the sentencing phase. J.A. 244. In support of this argument, Wilson's habeas counsel presented affidavits from Wilson's former teachers, family members, friends, and social workers. J.A. 156,

245. These witnesses described poor conditions in Wilson's childhood homes and testified that his mother's live-in boyfriends physically abused him. J.A. 246. They opined that appropriate treatment, guidance, and structure could have kept Wilson off death row. *Id.* Habeas counsel also presented an affidavit from a forensic neuropsychologist, Dr. Herrera, who opined that Wilson "had adequate intelligence," but that he also had attention-deficit/hyperactivity disorder and impairment in his brain's frontal lobes, which govern judgment and decision-making. J.A. 165-66. Affidavits from Dr. Kohanski concurred with Dr. Herrera's conclusion. J.A. 167.

The Butts County Superior Court (the "state habeas court") denied Wilson's petition in a written opinion. J.A. 30-86. The court found that trial counsel did not render deficient performance in investigating and presenting mitigation evidence. J.A. 60. It also ruled that any deficiency in investigating or presenting additional evidence for mitigation did not prejudice Wilson, as would be required for relief under *Strickland v. Washington*. *Id.* The court ruled that the lay testimony proffered at the evidentiary hearing "would have been inadmissible on evidentiary grounds, cumulative of other testimony, or otherwise would not have, in reasonable probability, changed the outcome of the trial." J.A. 61. Most of the lay affiants' testimony would not have been admissible because it was "largely based on hearsay or speculation or was cumulative of testimony elicited by defense counsel from [Wilson's] mother and

Dr. Kohanski at trial." J.A. 63. This included the testimony from Wilson's former teachers, which likewise "would have been largely cumulative of other evidence at trial . . . or otherwise inadmissible on evidentiary grounds." J.A. 62. Moreover, "even assuming its admissibility," the teachers' "limited contact" with Wilson and the "lapse in time between their contacts" and his crimes made it speculative. *Id.* The court also found that presenting Dr. Herrera's findings about frontal-lobe impairment and ADHD would not have changed the outcome of sentencing. J.A. 81-82.

Finally, the court determined that even if the additional potential mitigating evidence had been admissible at trial, there was "no reasonable probability" of a different outcome "given: (1) the limited nature of the additional, admissible, non-cumulative portions of Petitioner's potentially mitigating testimony; (2) the overwhelming evidence of Petitioner's guilt [which the court listed]; and (3) the evidence in aggravation that was presented to the jury." J.A. 70-71.

The Supreme Court of Georgia denied Wilson's application for a certificate of probable cause in a summary order. J.A. 87.

4. a. Wilson petitioned for a writ of habeas corpus under 28 U.S.C. § 2254 in federal district court. J.A. 88. He again claimed that his trial counsel provided ineffective assistance by failing to investigate his background sufficiently and failing to present an effective mitigation defense. *Id.* The district court denied relief. J.A. 89. The court declined to decide whether

counsel's performance was deficient, J.A. 144, because it "[could not] find the state habeas court's prejudice determination was based on unreasonable findings of fact or that it constitutes an unreasonable application of *Strickland*," J.A. 187. Among other things, the court found "questionable" Dr. Herrera's and Dr. Kohanski's findings and testimony regarding Wilson's alleged frontal-lobe impairment, particularly given Wilson's status as a gang leader and his correspondence from prison with another gang member, which outlined plans to prioritize "Money, Mackin, Murder" once out of prison. J.A. 179-81.

b. The court of appeals panel affirmed. J.A. 239. To begin, the court explained that the Supreme Court of Georgia's summary decision denying Wilson a certificate of probable cause was the final decision "on the merits" subject to review under § 2254(d). J.A. 249. Thus, "[i]nstead of deferring to the reasoning of the state trial court," the court would "ask whether there was any 'reasonable basis for the [Supreme Court of Georgia] to deny relief.'" *Id.* (second alteration in original) (quoting *Richter*, 562 U.S. at 98).

The court of appeals concluded that the Supreme Court of Georgia reasonably could have determined that Wilson failed to establish prejudice because "the overall mix of evidence, aggravating and mitigating, old and new," would not have created a reasonable probability of a different outcome at sentencing. J.A. 251, 254. The Supreme Court of Georgia could have reasonably concluded that the new lay testimony would have revealed and permitted introduction of

other evidence that undermined any potentially mitigating effect. J.A. 251. And the court could have reasonably concluded that the new expert testimony would not have shifted the balance of evidence because, among other things, it was unreliable: Dr. Herrera testified that Wilson tested "normal" for "attention, ability to focus, distractability, and impulsiveness . . . under the accepted, authoritative standards," and Dr. Herrera's conclusion that Wilson suffered impairment rested only on his "unique interpretation of the tests," because he had recommended against imaging Wilson's brain. J.A. 252-53. For these reasons, the court of appeals could not conclude that the Supreme Court of Georgia's decision "was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States." J.A. 254 (quoting 28 U.S.C. § 2254(d)(1)).

Judge Carnes joined the court of appeals' opinion in full, but concurred "to emphasize how heavily Wilson's criminal history weighs on the aggravating side of the sentencing scale," which "must be taken into account in determining whether the failure to present all available mitigating circumstance evidence was prejudicial." J.A. 255.

c. The court of appeals granted rehearing *en banc* on the question "whether federal courts must 'look through' the summary denial by the Supreme

Court of Georgia and review the reasoning of the Superior Court of Butts County." J.A. 305.[1] The *en banc* court concluded that federal courts "need not 'look through' a summary decision on the merits to review the reasoning of the lower state court." *Id.*

As a threshold matter, the *en banc* court of appeals held that the Georgia Supreme Court's summary denial of a certificate of probable cause in this case "is an adjudication on the merits." J.A. 311. The court explained that this determination matters because § 2254(d) requires review of "the last state-court adjudication on the merits." J.A. 310-11 (quoting *Greene*, 565 U.S. at 40). By contrast, a certiorari-like denial of discretionary review, like those provided in some states' appellate courts, would not be an adjudication on the merits subject to review under § 2254(d). J.A. 314-15. But, the court noted, the Georgia Supreme Court denies a certificate of probable cause only if the court determines that the appeal lacks "arguable merit" after thoroughly reviewing the evidence and petitioner's arguments. J.A. 313-14. Accordingly, the Georgia Supreme Court's "summary denial of Wilson's application for a

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[1] In briefing before the *en banc* court of appeals, Respondent acknowledged that "[t]he plain text of § 2254(d) does not require a federal court to 'look through' a summary denial that is an adjudication on the merits to the last reasoned state court opinion," but took the position that "the last reasoned opinion of a state court . . . should be the decision this Court reviews." Appellee's *En Banc* Br. at 17 n.7, 18, *Wilson v. Warden*, No. 14-10681 (11th Cir. Sept. 21, 2015). After careful consideration, Respondent concluded that the latter position was incorrect, as outlined in counsel's March 15, 2017 letter to the Clerk.

certificate of probable cause . . . is the final state court adjudication on the merits," which a federal court must review under § 2254(d). J.A. 317.

Turning to the question presented, the court of appeals held that a federal court is not required to "look through" a summary adjudication on the merits to review a lower state court's opinion under § 2254(d). *Id.* The court explained that this Court's decision in *Harrington v. Richter* provides the test for reviewing a summary merits decision under § 2254: Determine what arguments or theories "could have supported" the denial of relief, and then "ask whether it is possible fairminded jurists could disagree that those arguments or theories are inconsistent with the holding in a prior decision of [the] Court." J.A. 317-18 (alteration in original) (quoting *Richter*, 562 U.S. at 98).

The court of appeals rejected Wilson's argument that *Richter* applies only when there is no reasoned decision from any state court, explaining that neither § 2254(d) nor *Richter* suggests a different approach for when a lower court issues an opinion. J.A. 318. Although *Ylst v. Nunnemaker* directs courts to "look through" to a lower court's reasoned decision to determine whether a later summary decision rests on procedural or on merits grounds, it does not mandate a presumption that the later summary decision "rests on the same *specific* reasons provided by the lower court." J.A. 319-20 (emphasis in original) (citing *Ylst*, 501 U.S. 797, 803-04 (1991)). "[A]fter all," this Court "does not adopt the reasoning of a lower court when it issues a summary disposition." J.A. 320. The court of appeals

thus declined to "apply *Ylst* to a different context that it did not address." J.A. 322.

The court of appeals also explained that the principles of comity and federalism that undergird AEDPA supported its conclusion. J.A. 323-25. Those principles require giving the last state court to adjudicate a claim "the benefit of the doubt" by "presum[ing] that it 'follow[ed] the law'" rather than adopting the objectively unreasonable reasoning of a lower state court. J.A. 324 (second alteration in original). They also preclude imposing opinion-writing standards on state appellate courts, but requiring a "look through" approach would force a state appellate court "to provide a statement of reasons to prevent a federal court, on habeas review, from treating the decision of that state appellate court as a rubberstamp of the opinion below." *Id.*

The court of appeals acknowledged that a federal habeas court assessing a summary merits decision under *Richter* "may look to a previous opinion as one example of a reasonable application of law or determination of fact." J.A. 326. This is because when a state habeas court issues an opinion that reasonably applies and determines the relevant law and facts, "there is necessarily at least one reasonable basis on which the state supreme court could have denied relief and our inquiry ends." J.A. 327. The court reiterated, however, that "the relevant state court decision for federal habeas review remains the last adjudication on the merits, and federal courts are not limited to assessing the reasoning of the lower court." *Id.*

Finally, the court of appeals observed that this Court has never required "look[ing] through" a merits decision to evaluate "the specific reasoning used by the lower state court." J.A. 328. In *Brumfield v. Cain*, 135 S.Ct. 2269 (2015), and *Johnson v. Williams*, 133 S.Ct. 1088 (2013), this Court looked through a denial of *review* to find and review the last state-court adjudication on the merits. J.A. 328-29. And in *Premo v. Moore*, 562 U.S. 115 (2011), this Court "appears to have applied *Richter* despite the trial court offering a reasoned opinion." J.A. 330.

Five judges dissented in two separate opinions. J.A. 333-44 (Jordan, J., dissenting); J.A. 344-94 (Jill Pryor, J., dissenting). The dissenting judges agreed that "under § 2254(d) a federal habeas court reviews . . . 'the last state-court adjudication on the merits,'" J.A. 352 (quoting *Greene*, 565 U.S. at 40), and they "agree[d] that here the last state court decision on the merits is the Georgia Supreme Court's denial of Mr. Wilson's application for a certificate of probable cause." J.A. 352 (citing *Foster*, 136 S.Ct. at 1746 n.2). But they would have held that "the federal habeas court should presume that when the Georgia Supreme Court summarily denies an application for a certificate of probable cause, it implicitly adopted the superior court's reasoning." J.A. 352-53. Thus, they "would have the federal court review whether the reasoning in the Georgia superior court's decision . . . is entitled to deference under § 2254(d)." *Id.*

d. After the *en banc* court of appeals remanded all outstanding issues, the panel reinstated its earlier

opinion because it "reviewed the correct state-court decision and the remaining issues have not changed." J.A. 395-96. That decision is the subject of a separate petition for certiorari pending before this Court. *See Wilson v. Sellers*, No. 17-5562.

SUMMARY OF ARGUMENT

A. AEDPA limits a federal court's power to grant habeas relief. Under 28 U.S.C. § 2254(d), the court may grant relief if and only if a petitioner can prove that the state-court "decision" on the merits of his federal claim was "contrary to" this Court's decisions; "involved an unreasonable application of" those decisions; or "was based on an unreasonable determination of the facts." The single state-court decision subject to this deferential review is the decision resulting from the last state-court adjudication on the merits.

Because § 2254(d) requires review of the state court's "decision," its deferential standard applies even if the last state court did not provide reasons for its decision. *Harrington v. Richter* explained how to apply that standard to a summary merits decision: Review the record and determine whether any reasonable basis could have supported the decision. If so, the court may not grant habeas relief.

B. This approach to reviewing summary state-court merits decisions under § 2254(d) does not change if, as here, a lower court issued an opinion explaining

its own decision to deny relief. Wilson contends that in that case, the federal habeas court must "look through" the last state-court merits decision and apply § 2254(d)'s standard only to the lower state court's reasoning. AEDPA's text and animating principles demand otherwise.

AEDPA's text neither requires nor permits Wilson's "look through" approach. Section 2254(d) conditions a federal court's power to grant habeas relief on whether the last state-court merits "decision" rests on unreasonable legal or factual determinations, not whether the earlier "reasoning" or "opinion" of a lower state court relies on such bases. It thereby precludes Wilson's approach, which would authorize a grant of habeas relief based only on a determination that a lower state court's specific reasoning provided an unreasonable basis for denying a claim. A federal habeas court certainly may examine a lower state court's opinion as part of its search for arguments or theories that could have supported a later summary merits decision. But the federal court may only grant relief if no reasonable basis could have supported the last state-court merits decision. Only then can the court be sure that the prerequisite for granting relief under § 2254(d) is met. Wilson offers not one textual argument to the contrary.

Wilson's "look through" requirement would also contravene AEDPA in other ways. It imposes an opinion-writing standard by forcing state appellate courts to issue either a reasoned opinion or a disclaimer—at

least if they want to receive the deference AEDPA affords through § 2254(d)'s standard, protect the finality of their judgments, and prevent federal courts from automatically imputing a lower court's reasoning to them. And Wilson's focus on grading the reasoning of state courts places federal courts back in the kind of paternalistic relationship with state courts AEDPA was designed to end. By contrast, treating summary state-court decisions as AEDPA requires and as *Richter* demonstrates furthers the principles of comity and federalism that animate AEDPA.

C. By focusing on the "last reasoned decision," Wilson's "what the state court knew and did" requirement ignores AEDPA's requirement that federal habeas courts review the "decision" resulting from the "last state court adjudication on the merits." To the extent he tries to square his proposed requirement with that textual one, however, it is by invoking a "presumption" that a last state court that issues a summary merits decision *silently adopts a lower state court's opinion*.

This presumption is not sound and it does not save Wilson's position. Wilson's presumption would attribute error to state supreme courts every time they summarily affirm lower state courts that wrote unreasonable opinions, even if another reasonable basis could have supported the higher court's decision. This evinces a striking lack of respect for the ability of state supreme courts to adjudicate constitutional rights, and doubly so because it treats those state courts' summary affirmances exactly the opposite of how this

Court and other federal courts treat their own summary affirmances.

Wilson derives his "look through" rule from an overly expansive reading of this Court's pre-AEDPA decision in *Ylst v. Nunnemaker*. That decision approved "looking through" a summary state-court decision to determine whether the decision was even a merits decision that a federal habeas court could review in the first place. If the previous court had identified a procedural default, *Ylst* held that federal courts may presume that the later state court denied relief on the same ground, because it was "most improbable" that the later court would silently lift that procedural bar and decide the merits of the claim.

Ylst's narrow presumption about how state courts treat state procedural bars cannot support Wilson's much broader presumption that higher state courts silently adopt lower courts' specific reasoning. For one thing, AEDPA precludes it; a judge-made presumption invoked to apply a judge-made prudential rule cannot justify ignoring a statutory limitation on the scope of habeas corpus. For another, *Ylst* approved a presumption that more likely reflected what the higher state court actually did; Wilson's rule makes the improbable assumption that a higher state court will always adopt unreasonable reasoning of a lower state court even if another reasonable basis could have supported a given decision. Finally, it is at the very least incongruous to rely on *Ylst*'s presumption to expand federal courts' power to grant relief. *Ylst* preserved a prudential constraint on federal habeas relief that is grounded in

concerns of comity and federalism; Wilson borrows it to expand federal courts' power to grant habeas relief based on grading lower state courts' reasoning rather than applying deferential review to the last state-court merits decision.

D. Although this Court has used *Ylst*'s "look through" terminology in § 2254(d) cases outside the context of preserving state procedural bars, it has neither applied it in a way that is inconsistent with AEDPA or *Richter* nor required Wilson's expanded use of *Ylst*'s "look through" tool. Wilson cites § 2254(d) cases where the Court has "looked through" a higher state court's summary denial of discretionary review to find and review the actual last state-court decision on the merits, and cites others where the Court has upheld state-court denials of habeas relief because a lower state court has reasonably applied and determined the relevant law and facts. None of these cases require using *Ylst*'s "look through" tool as Wilson would—to get past § 2254(d)'s deferential standard without determining that no reasonable basis could have supported the last state-court merits decision.

E. Nothing specific to Georgia's habeas procedures warrants a different approach to reviewing the Georgia Supreme Court's summary denials of certificates of probable cause. Under Georgia's two-tiered system for review of postconviction claims, unless a claim is procedurally barred, the Supreme Court of Georgia's denial of a certificate of probable cause is the last state-court adjudication on the merits of that claim. If that decision is summary, the federal habeas

court must determine whether any reasonable legal and factual bases could have supported it—a determination that will usually involve, but is not limited to, looking to the state habeas court's opinion. AEDPA authorizes the court to grant relief only if the petitioner can show that no such reasonable bases could have supported the Georgia Supreme Court's decision.

ARGUMENT

Federal habeas courts are not required to "look through" a later summary state-court merits decision to review only a lower state court's reasoning.

A. A federal habeas court reviews the last state-court decision on the merits under § 2254(d), even if it is not accompanied by a statement of reasons.

AEDPA limits a federal court's power to grant habeas relief to persons in custody pursuant to state-court judgments. It does so by requiring the federal court to review claims adjudicated on the merits in state court under a "difficult to meet" and "highly deferential" standard. *Cullen v. Pinholster*, 563 U.S. 170, 181 (2011). Specifically, the reviewing court must determine whether the state court's adjudication of the claim "resulted in a decision" that "was contrary to" federal law clearly established in holdings of this Court; "involved an unreasonable application of" such law; or "was based on an unreasonable determination

of the facts." 28 U.S.C. § 2254(d); *see also Richter*, 562 U.S. at 100. A federal court "shall not" grant habeas relief unless the petitioner can make that showing. 28 U.S.C. § 2254(d).

The only state-court decision under review is the *last* one to decide the merits of the petitioner's claim. Section 2254(d) contemplates measuring just one state-court merits decision against its deferential standard; a federal court may not grant habeas relief "unless *the* adjudication of the claim . . . resulted in *a* decision" that rests on an unreasonable basis. *Id.* (emphasis added); *see also Greene*, 565 U.S. at 40. And the single adjudication subject to that determination is the "last state court adjudication on the merits." *Greene*, 565 U.S. at 40. This is only logical: For one thing, a federal court cannot grant habeas relief under § 2254 until the petitioner has exhausted the remedies available in state court, including state appellate review. *See* 28 U.S.C. § 2254(b)(1); *O'Sullivan v. Boerckel*, 526 U.S. 838, 845 (1999) (exhaustion requires "invoking one complete round of the State's established appellate review process"). For another, the last state court's decision to deny the petitioner's claims is the one that keeps the petitioner in the "custody pursuant to the judgment of a State court" from which he or she seeks relief. 28 U.S.C. § 2254(a). It is therefore unsurprising that even the dissenting judges below recognized that a federal court reviews "the last state-court adjudication on the merits" under § 2254(d). J.A. 352 (Jill Pryor, J., dissenting) (quoting *Greene*, 565 U.S. at 40); *see also*, *e.g.*, *Eley v. Erickson*, 712 F.3d 837, 845 (3d Cir. 2013)

("Under AEDPA, we review the last state court decision on the merits."); *Rock v. Conway*, 470 F. App'x 15, 17 (2d Cir. 2012) (per curiam) (same); *Dyer v. Bowlen*, 465 F.3d 280, 284 (6th Cir. 2006) (same).

AEDPA's deferential standard applies to the last state-court adjudication on the merits whether or not the state court gave reasons for why it denied relief. *Richter*, 562 U.S. at 98. As this Court observed in *Richter*, "no text in [§ 2254] requir[es] a statement of reasons." *Id.* Section 2254(d) tells the federal court to review a "decision" that resulted from the adjudication, not an "opinion" or "reasoning." *See* 28 U.S.C. § 2254(d). The federal habeas court can determine "whether a state court's decision resulted from an unreasonable legal or factual conclusion" without "an opinion from the state court explaining the state court's reasoning." *Richter*, 562 U.S. at 98. Thus, "[w]here a state court's decision is unaccompanied by an explanation, the habeas petitioner's burden still must be met by showing there was no reasonable basis for the state court to deny relief." *Id.*

Richter also explains that this approach protects the integrity of state case law. "The issuance of summary dispositions in many collateral attack cases can enable a state judiciary to concentrate its resources on the cases where opinions are most needed." *Id.* at 99. Requiring state supreme courts to issue a statement of reasons (by otherwise denying them the deferential review Congress afforded with AEDPA) would "undercut" that common practice, which allows state courts to

"preserve the integrity of the case-law tradition" while managing heavy caseloads. *Id.*

Richter does more than simply confirm that § 2254(d)'s deferential standard applies to summary state-court merits decisions. It also demonstrates how to apply that standard to a summary state-court decision: Review the record and determine "what arguments or theories . . . could have supported[] the state court's decision." *Id.* at 102. Then, apply the § 2254(d) standard—*i.e.*, "ask whether it is possible fairminded jurists could disagree that those arguments or theories are inconsistent with the holding in a prior decision of this Court." *Id.*

This approach is not novel. Even before *Richter*, federal courts of appeals had already been reviewing summary state-court decisions in this way. *See, e.g.*, *id.* at 98 (collecting court of appeals cases); *Harris v. Stovall*, 212 F.3d 940, 943 (6th Cir. 2000) ("Other circuit courts have concluded that where the state court has not articulated its reasoning, federal courts are obligated to conduct an independent review of the record and applicable law to determine whether the state court decision is contrary to federal law, unreasonably applies clearly established law, or is based on an unreasonable determination of the facts in light of the evidence presented."). *Richter* confirmed that those courts had it right: When faced with a summary state-court merits decision, review the record and determine whether any reasonable basis could have supported that decision.

B. The last state-court merits decision is the decision under review whether or not a lower state court issued an opinion.

In *Richter*, the last state-court adjudication on the merits was also the only adjudication of the petitioner's claim, so no state court had provided specific reasoning for rejecting the claim at issue. 562 U.S. at 96. Here, two Georgia courts adjudicated Wilson's ineffective-assistance claim on the merits: The Georgia superior court sitting in habeas denied his claim on the merits and issued an opinion. And the Supreme Court of Georgia then summarily denied his application for a certificate of probable cause, which both this Court and the *en banc* court of appeals—even the dissenters—have concluded is also an adjudication on the merits. *See Foster v. Chatman*, 136 S.Ct. 1737, 1746 n.2 (2016) (Georgia Supreme Court's denial of a certificate of probable cause "would seem to be a decision on the merits of [the] claim"); J.A. 311-12 (Georgia Supreme Court's denial of an application for a certificate of probable cause is an "adjudication on the merits under section 2254"); J.A. 352 (Jill Pryor, J., dissenting) ("The majority and I agree that here the last state court decision on the merits is the Georgia Supreme Court's denial of Mr. Wilson's application for a certificate of probable cause."). This means that the Georgia Supreme Court's summary decision in this case is the last state-court adjudication on the merits subject to review under § 2254(d).

Wilson deems the existence of a lower state-court opinion a dispositive difference that requires a federal

court to jettison *Richter*'s approach to reviewing a summary merits decision. He argues that a federal court should instead "look through" the last state-court merits decision to review only the lower state court's reasoning in such a case, which he justifies with a fiction: that a last state court silently incorporates and adopts as its own a lower state court's specific reasoning by issuing a summary decision. Br. 18, 20, 38. Under Wilson's view, a determination that a lower state court's opinion contains unreasonable legal or factual determinations authorizes a federal habeas court to overturn the last state-court adjudication on the merits.

Wilson is wrong. As an initial matter, *Richter*'s holding is not, by its own terms, limited to situations where no state court has ever issued an opinion addressing the claim at issue. *Richter*, 562 U.S. at 98 (applying "no reasonable basis" approach "[w]here a state court's decision is unaccompanied by an explanation"). In any event, AEDPA demands the approach demonstrated in *Richter* and precludes Wilson's "look through" requirement for the same basic reason: AEDPA permits granting habeas relief only after a court determines that the *last* state-court merits *decision* resulted from unreasonable legal or factual conclusions, not merely that an earlier state-court opinion relies on an unreasonable basis.

1. AEDPA's text requires review of the last state-court merits decision, not a lower state court's reasoning.

It bears repeating that the text of § 2254(d) does not call for review of a state court's *reasoning*. Section 2254(d) requires only that the federal habeas court apply its deferential standard to the "decision" that resulted from a state court's "adjudication" of a claim. 28 U.S.C. § 2254(d). "A judicial decision and a judicial opinion are not the same thing." *Wright v. Sec'y, Dep't of Corr.*, 278 F.3d 1245, 1255 (11th Cir. 2002). A "decision" is a court's ultimate determination of a claim. *Decision*, Black's Law Dictionary (10th ed. 2014) ("A judicial or agency determination, . . . esp[ecially] a ruling, order, or judgment pronounced by a court when considering or disposing of a case"). An "opinion" is a court's "written statement explaining its decision." *Id.* at *Opinion*. A court "may, or may not, attempt to explain the decision in an opinion." *Wright*, 278 F.3d at 1255; *see Decision*, Garner's Dictionary of Legal Usage (3d ed. 2011) ("Technically, in the U.S., judges are said to write opinions to justify their decisions or judgments; they do not write decisions. . . .").

As this Court held and demonstrated in *Richter*, a federal court does not need a state court's "opinion" to review that court's "decision" under § 2254(d). *Richter*, 562 U.S. at 98; *see also Johnson*, 568 U.S. at 310 (Scalia, J., concurring in judgment) ("For what is accorded deference [under AEDPA] is not the state court's reasoning but the state court's judgment. . . ." (citing *Richter*,

562 U.S. at 102)). Even Wilson agrees that point is "uncontroversial." Br. of Pet'r (Br.) 29.

Wilson fails to acknowledge what this means, however. It means that the plain language of the statute does not require Wilson's "look through" requirement for substantive review under § 2254(d). He would require a federal court to ignore a summary merits "decision" of a higher state court and review the "opinion" of a lower state court instead. *See* Br. 18-19. But if § 2254(d) requires review of a "decision" and does not require review of any "opinion," it cannot require reviewing only a lower state court's opinion just because a higher state court provided only a summary decision.

Wilson's problem runs deeper than lacking a textual hook for his rule: AEDPA simply precludes it. Section 2254(d) requires review of only a single "adjudication" and the single "decision" that "resulted" from it. *Greene*, 565 U.S. at 40 ("The words 'the adjudication' in the "unless" clause obviously refer back to the 'adjudicat[ion] on the merits,' and the phrase 'resulted in a decision' in the 'unless' clause obviously refers to the decision produced *by that same adjudication on the merits*." (alteration in original)). And the single decision under review is the one that results from "the *last* state-court adjudication on the merits." *Id.* (emphasis added). The import is clear: Section 2254(d) authorizes a federal court to grant relief *only* on the basis that the *last state-court merits decision* was contrary to or involved an unreasonable application of this Court's decisions, or was based on an unreasonable factual determination. It does not authorize a federal court to

grant relief on any other basis—including that, by "looking through" the last merits decision, a federal habeas court found defective reasoning in a lower state court's opinion explaining its own decision.

This does not mean a federal court is "outlaw[ed]" (Br. 44) from reviewing any opinions lower state courts issued prior to a summary state-court merits decision. Nothing in AEDPA precludes a federal court from looking to the record that was before the last state court or any opinions issued by lower state courts to determine "what arguments or theories . . . could have supported" the last merits decision. *Richter*, 562 U.S. at 102. As the *en banc* court of appeals recognized, a federal court applying *Richter* certainly may search a lower state court's opinion, if there is one, for reasonable bases that could have supported a later summary merits decision. *See* J.A. 326 ("[A] federal habeas court may look to a previous opinion as one example of a reasonable application of law or determination of fact."). Indeed, if that opinion supplies a reasonable basis in law and fact that could have supported the later summary decision, the federal habeas court's inquiry ends there. J.A. 327.

On the other hand, if a federal habeas court looks to a lower state court's opinion and discovers that it *un*reasonably applied or determined the relevant law or facts, the court cannot stop there (as Wilson would require), because § 2254(d) only authorizes the court to grant relief if the *last* state-court merits *decision* lacks a reasonable basis. *See* 28 U.S.C. § 2254(d); *Greene*, 565 U.S. at 40. To ensure that this statutory prerequisite to granting relief is met, the federal habeas court must

determine whether another reasonable basis could have supported the last state-court merits decision. *Richter*, 562 U.S. at 102. If (and only if) none could have, the federal court can be sure that granting relief based on that analysis would be authorized, because it would confirm that the summary state-court merits decision *only* could have involved an unreasonable application or determination of the relevant law or facts—the prerequisite for granting relief under § 2254(d). *See Richter*, 562 U.S. at 98. Absent that complete analysis, a federal habeas court has no authority to grant relief, because its only basis for doing so would be a determination that a *lower court's opinion* rested on an unreasonable basis, not that the *last* state-court merits *decision* did.[2]

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[2] Similarly, if the last state court to adjudicate the merits of the claim does give reasons for its decision, the federal court may look to that reasoning to help conduct the § 2254(d) analysis. *See, e.g.*, *Porter v. McCollum*, 558 U.S. 30, 42-44 (2009) (per curiam). But that does not change the basic premise that § 2254(d) requires review of "a decision"; whether its standard is met does not turn on whether the state court articulated—perfectly, or even at all—a reasonable basis for its decision. *See, e.g.*, *White v. Wheeler*, 136 S.Ct. 456, 461 (2015) (per curiam) (reversing grant of relief under § 2254(d) because, notwithstanding conclusory reasoning by the state court, "the Kentucky Supreme Court's *decision* to affirm" was not "so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement" (emphasis added)); *Woodford v. Visciotti*, 537 U.S. 19, 23-24 (2002) (per curiam) (state court's use of word "probable" rather than "reasonably probable" did not justify circuit court in overturning state-court decision; the state court was just using imprecise shorthand). A federal court can (and under *Richter*, must) apply AEDPA's deferential

Wilson does not even attempt to provide a textual justification for his position; he claims that § 2254(d) analysis can turn on the sufficiency of a lower state court's reasoning alone because that opinion shows "what the state court knew and did," Br. 25, a phrase he pulls from a case that has nothing to do with how to review summary state-court merits decisions, *see Pinholster*, 563 U.S. at 182. But this newly minted "standard" conflicts with § 2254(d), at least how Wilson uses it. Section 2254(d)'s focus is not what any state court "knew and did"; its sole concern is what the *last* state court *decided*. *See Greene*, 565 U.S. at 40. An earlier, lower-state-court opinion can only ever explain what that court "knew and did," not what legal and factual bases supported a not-yet-existing last state-court merits decision. And the latter question is the only one that matters under § 2254(d). If a higher state court has decided the merits of a claim, § 2254(d) does not permit a federal court to grant habeas relief based only on defects found in a lower state court's earlier opinion.

In short, AEDPA's text authorizes a federal court to grant habeas relief if and only if the "decision" resulting from the "last state-court adjudication on the merits" of a claim "was contrary to" this Court's decisions, "unreasonabl[y] appli[ed]" them, or "unreasonabl[y] determin[ed]" the facts. 28 U.S.C. § 2254(d). A showing that a lower state court's opinion rested on such bases, standing alone, is not sufficient to get past

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standard with or without an explanation of the last state-court merits decision.

that deferential standard, and Wilson offers no textual support to the contrary.

2. A "look through" requirement would impose an impermissible opinion-writing standard.

Congress enacted AEDPA, including the current version of § 2254(d), to advance "the principles of comity, finality, and federalism." *Williams v. Taylor*, 529 U.S. 420, 436 (2000). This Court has recognized that advancing those principles means not imposing opinion-writing requirements on state courts. Federal courts "have no power to tell state courts how they must write their opinions," *Coleman v. Thompson*, 501 U.S. 722, 739 (1991), and doing so would cause all manner of problems for state judiciaries. *See, e.g.*, *Richter*, 562 U.S. at 99 ("[R]equiring a statement of reasons could undercut state practices designed to preserve the integrity of the case-law tradition.").

Wilson's "look through" requirement would create a new opinion-writing standard for state courts. By permitting federal habeas courts to overturn a summary state-court merits decision based only on a lower state court's explanation for denying a claim, that requirement would treat state-court summary affirmances as a "rubberstamp" of the specific reasoning provided by the lower state court. J.A. 324; *see also infra* section C; *Cannedy v. Adams*, 733 F.3d 794, 802 (9th Cir. 2013) (O'Scannlain, J., dissenting from denial of rehearing *en banc*) (interpreting a state court's decision to adopt a

lower court's reasoning because it issued a summary decision as imposing an opinion-writing standard). To avoid that treatment, higher state courts would either have to do away with summary dispositions altogether or at least provide an additional statement indicating that the court does not necessarily agree with the reasoning of the court below. The first is a nonstarter for busy state courts interested in "preserv[ing] the integrity of the case-law tradition." *Richter*, 562 U.S. at 99. As for the second, federal courts have no authority to demand such statements "as the price of federal respect for" state-court merits decisions. *Johnson v. Lee*, 136 S.Ct. 1802, 1807 (2016). Moreover, coercing state courts to "us[e] particular language in every case in which a state prisoner presents a federal claim" would be an especially poor way to promote the principles of comity and federalism that underpin AEDPA. *Coleman*, 501 U.S. at 739.[3]

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[3] At the same time, Wilson's rule creates a perverse incentive for the states. Consider the dichotomy it would create: In states like California with procedures that do not generate any reasoned opinions, summary decisions would still be upheld under *Richter* if any reasonable basis could have supported them. But in states like Georgia that have "implemented a system that invests substantial time and resources in the taking of evidence and the production of reasoned lower court decisions," Br. 33, only a lower state court's reasoning would get deference if the last state-court merits decision is summary. In other words, Wilson would afford broader deference to state judiciaries that provide *no* reasoned opinions explaining why they reject petitioner's claims than to those that make special efforts to provide explanations. Wilson lauds Georgia courts for providing reasoned decisions while proposing a rule for federal habeas review that penalizes them for

The better approach—the one required by AEDPA and demonstrated in *Richter*—presumes that higher state courts do not adopt unreasonable opinions of lower state courts, as opposed to forcing them to disclaim that possibility expressly in each one of thousands of decisions. Upholding the last state-court merits decision if a reasonable basis could have supported it relieves state courts of the concern that issuing a summary decision automatically saddles them with unreasonable opinions of lower state courts. In some instances, a higher state court may expressly adopt reasoning of a lower state court or make clear that it rejects it. But if the court says nothing—as is its prerogative—federal courts must presume that if a reasonable basis for the last merits decision exists, the last court knew and followed the applicable law and relied on that reasonable basis to support its decision.

3. Limiting review to only a lower state court's reasoning would put federal courts back in the paternalistic relationship to state courts AEDPA was designed to end.

Section 2254(d)'s focus on state courts' decisions rather than their reasoning reflects AEDPA's rejection of a "grading papers approach" to federal habeas review of state-court adjudications. *Washington v. Roberts*, 846 F.3d 1283, 1293 (10th Cir. 2017) (quoting

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doing so, thereby incenting states to stop providing any reasoned decisions at all.

Ferguson v. Sec'y, Fla. Dep't of Corr., 716 F.3d 1315, 1337 (11th Cir. 2013); *see also, e.g.*, *Hooks v. Workman*, 666 F.3d 715, 763-64 (10th Cir. 2010) ("We are not here to grade its papers, but to assess the results of its efforts as directed by the AEDPA."); *Cruz v. Miller*, 255 F.3d 77, 86 (2d Cir. 2001) ("It is true that the state trial court incorrectly relied on the interrogating officer's subjective state of mind . . . but we are determining the reasonableness of the state courts' 'decision,' . . . not grading their papers."). Determining whether a reasonable basis could have supported a summary state-court merits decision preserves AEDPA's deferential mode of review by keeping the focus only on the ultimate decision, not on state courts' specific reasoning.

Wilson's "look through" requirement does just the opposite, placing the federal court right back in "the kind of tutelary relation to the state courts that [AEDPA was] designed to end." *Hennon v. Cooper*, 109 F.3d 330, 335 (7th Cir. 1997). Wilson is not shy about this point. He treats *Richter* as an outlier limited only to California's "idiosyncratic" postconviction-review system, Br. 31, and repeatedly calls for a return to judging "not simply . . . the state court *outcome*," *id.* 25, but also the "reasoning" that produced it, Br. 32; *see also* Br. 18. Indeed, this desire to allow federal courts to pick apart state courts' opinions as a means to grant habeas relief animates the entire argument for choosing his rule over *Richter*. Br. 24-25 (explaining his "what a state court knew and did" rule as requiring review of state courts' reasoning); *see also* Ret. Justices'

Amicus Br. 2, 16 (advocating for review of only "express . . . reasoning" of state courts instead of their "decisions").

Wilson's brief attack on the state habeas court's opinion in this case reflects this outmoded approach to federal habeas review. He faults that court for providing "non-specific platitudes and perfunctory phrases," Br. 10, "not explain[ing] precisely what testimony . . . was inadmissible (or why)," Br. 51, and "fail[ing] to acknowledge this Court's decisions finding prejudice for failing to present similar testimony," Br. 52. And he dismisses the court of appeals panel's reasoning that could have supported a no-prejudice determination because the state habeas court "did not make" any of those determinations in its opinion. Br. 54. Wilson leaves no doubt that adopting his position means reviving the grading-papers approach to federal habeas review that AEDPA eliminated.

C. There is no sound basis for presuming that a summary state-court merits decision silently incorporates a lower state court's specific reasoning.

By focusing on the "last reasoned decision," Wilson's "what the state court knew and did" requirement appears to ignore § 2254(d)'s requirement that federal habeas courts review the "decision" resulting from the "last state-court adjudication on the merits." *Greene*, 565 U.S. at 39-40. To the extent he tries to square his proposed requirement with that textual one, however,

it is by invoking a "presumption" that a last state court that issues a summary merits decision silently adopts a lower state court's specific reasoning. *See, e.g.*, Br. 20, 38.

That presumption is an unwarranted fiction, and it does not save Wilson's atextual rule. In every case where the difference in approach to summary decisions matters, Wilson's presumption conflicts with AEDPA's presumption that state courts know and follow the law. It also conflicts with federal courts' (and this Court's) own treatment of summary dispositions. And it finds no support in *Ylst v. Nunnemaker*, the pre-AEDPA case about preserving state procedural bars that Wilson wrongly tries to extend to substantive review under § 2254(d).

1. Wilson's presumption shows a disrespect for state judiciaries that is contrary to AEDPA's design.

Using AEDPA's required approach to reviewing summary decisions versus Wilson's "look through" requirement leads to a different conclusion about whether a federal court may grant habeas relief in one scenario: when a lower state court's specific reasoning unreasonably applies or determines the relevant law or facts, but a different, reasonable basis could have supported the last state court's summary merits decision. For example: A lower state court rejects a claim of ineffective assistance on the basis that counsel's performance was not deficient, and that court's reasoning

involves an unreasonable application of this Court's decisions—but a later state court could have reasonably applied this Court's decisions to conclude that the petitioner failed to establish prejudice. In such a case, a federal habeas court applying § 2254(d)'s standard as *Richter* demonstrated would deny relief because it would review the record and determine that the reasonable basis (no prejudice) could have supported the last state-court merits decision. By contrast, a court applying Wilson's approach would "look through" the last state-court decision on the merits to review only the lower state court's opinion, determine it unreasonably applied the relevant law (on deficient performance), and consider that sufficient to overcome § 2254(d)'s standard.[4]

In that scenario where the difference in approach could determine the outcome, Wilson's approach evinces a striking disrespect for state courts. This is

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[4] These approaches to summary decisions will not lead to divergent results in the other two scenarios that could arise. When the lower state court's specific reasoning involves unreasonable legal or factual conclusions and no other reasonable basis could have supported the last state court's summary decision, a federal habeas court would grant relief under either approach; an independent review of the record (*Richter*) and looking through to review only the lower state court's opinion (Wilson) would both lead to the conclusion that the last state-court merits decision rested on unreasonable legal or factual conclusions. And when the lower state court's reasoning does *not* rely on an unreasonable basis, the federal court would deny relief under either approach—looking through to review only that opinion would reveal an opinion that reasonably applies and determines the law and facts, and under *Richter*, that opinion would supply a "reasonable basis" that "could have supported" the last state court's summary merits decision.

because Wilson props up his "look through" requirement with the presumption that the last state court to decide a claim adopts a lower state court's reasoning when it issues a summary affirmance. In the case where the lower court denies relief on an unreasonable basis despite the existence of a reasonable one, that means presuming that the last state court—often the state's highest court—ignored a reasonable basis that could have supported its decision and instead adopted, in full, a lower state court's opinion that unreasonably applied this Court's decisions or unreasonably determined the facts.

This "readiness to attribute error" to state supreme courts that issue summary decisions does not square with AEDPA's design. *Visciotti*, 537 U.S. at 24. AEDPA recognizes that state courts share with federal courts "the solemn responsibility . . . to safeguard constitutional rights," and that they are equally "adequate forums" for vindicating those rights. *Burt v. Titlow*, 134 S.Ct. 10, 15 (2013). Accordingly, provisions like § 2254(d) "demand[] that state-court decisions be given the benefit of the doubt," *Pinholster*, 563 U.S. at 181 (quoting *Visciotti*, 537 U.S. at 24), and "reflect a 'presumption that state courts know and follow the law'"—not the opposite, *Woods v. Donald*, 135 S.Ct. 1372, 1376 (2015) (quoting *Visciotti*, 537 U.S. at 24). Indeed, "this Court has refused to sanction any decision that would 'reflec[t] negatively upon [a] state court's ability'" to adjudicate constitutional rights. *Titlow*, 134 S.Ct. at 15 (alterations in original) (quoting *Trainor v. Hernandez*, 431 U.S. 434, 443 (1977)). By attributing

lower state courts' unreasonable opinions to state supreme courts even in cases where those courts could have relied on a reasonable basis instead, Wilson's approach to summary decisions reflects an utter lack of faith in the ability of the highest state courts to adjudicate constitutional rights.

This case provides a ready example of the distrust inherent in Wilson's foundational presumption. The state habeas court, a Georgia trial court, denied Wilson's claim of ineffective assistance in part because the mitigation evidence he introduced in habeas proceedings would have been either "inadmissible on evidentiary grounds, cumulative of other testimony, or otherwise would not have, in reasonable probability, changed the outcome of the trial." J.A. 61-65. The Supreme Court of Georgia then denied Wilson's claim on the merits in a summary decision. J.A. 87. Under Wilson's rule, if the state habeas court's reasons for denying his claim unreasonably applied this Court's decisions—which Wilson seems to believe is the case, *see* Br. 52-53—the federal habeas court would be authorized to overturn the Georgia Supreme Court's summary decision, because it must presume that court silently adopted the lower state court's allegedly defective reasoning.[5] In other words, Wilson's rule would attribute error to higher state courts every time they

[5] Wilson is wrong to suggest that the state habeas court unreasonably applied this Court's decisions in rejecting his ineffective-assistance claim, as the district court's opinion below makes clear. *See, e.g.*, J.A. 170-71 (finding no federal-law ground for rejecting the state habeas court's conclusion that much of the new mitigation evidence would have been inadmissible based on

summarily affirm lower state courts that unreasonably applied or determined the relevant law or facts—even when a different, reasonable basis could have supported the higher court's decision.

A proper application of § 2254(d) in this case presumes instead that the Georgia Supreme Court knows this Court's case law, undertook its own review of the record, and found a reasonable legal and factual basis for its summary decision if one exists. The panel decision below reflects that approach: Instead of grading the state habeas court's reasoning, the panel held that the Georgia Supreme Court could have reasonably determined that Wilson failed to establish the *Strickland* prejudice required to establish an ineffective-assistance claim because "the overall mix of evidence, aggravating and mitigating, old and new," would not have changed the jury's mind about sentencing him to death. J.A. 251, 254. Unlike Wilson's "look through" requirement, that approach affords the Supreme Court of Georgia and every other state judiciary the "benefit of the doubt" that AEDPA and our federal system require.

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state-law evidentiary grounds); J.A. 175-76 (not unreasonable to reject new mitigation evidence as cumulative because it added more details or examples of the same basic story presented at trial); J.A. 177-85 (not unreasonable to conclude that new evidence of frontal-lobe impairment would not have, with reasonable probability, changed the outcome of sentencing).

2. Federal courts, including this Court, do not assume summary affirmances adopt the opinion below.

Federal courts have expressly rejected the treatment of summary affirmances Wilson's presumption requires. This Court is unequivocal on the point: "When we summarily affirm, without opinion, . . . we affirm the judgment but not necessarily the reasoning by which it was reached." *Mandel v. Bradley*, 432 U.S. 173, 176 (1977) (alteration in original) (quoting *Fusari v. Steinberg*, 419 U.S. 379, 391 (1975) (Burger, C.J., concurring)); *see also, e.g.*, *Comptroller of Treasury of Maryland v. Wynne*, 135 S.Ct. 1787, 1801 (2015) ("[A] summary affirmance is an affirmance of the judgment only, and the rationale of the affirmance may not be gleaned solely from the opinion below." (quotation marks omitted)); *Pac. Gas & Elec. Co. v. State Energy Res. Conservation & Dev. Comm'n*, 461 U.S. 190, 212 n.24 (1983) ("[A]s with all summary affirmances, our action is not to be read as an adoption of the reasoning supporting the judgment under review." (quotation marks omitted)). Federal courts of appeals have the same rule. *See, e.g.*, *Rates Tech., Inc. v. Mediatrix Telecom, Inc.*, 688 F.3d 742, 750 (Fed. Cir. 2012); *Diesel Mach., Inc. v. B.R. Lee Indus., Inc.*, 418 F.3d 820, 830 (8th Cir. 2005); *Booher v. U.S. Postal Serv.*, 843 F.2d 943, 945 n.2 (6th Cir. 1988); *DeShong v. Seaboard Coast Line R.R. Co.*, 737 F.2d 1520, 1523 (11th Cir. 1984).

This treatment makes good sense. Providing that summary affirmances affirm the judgment alone promotes the efficient allocation of judicial resources by permitting appellate courts to avoid spending limited resources writing opinions that are not needed, *e.g.*, in a well-trodden area of law. *See, e.g.*, *Mandel*, 432 U.S. at 176 ("Summary actions . . . should not be understood as breaking new ground but as applying principles established by prior decisions to the particular facts involved."). It also allows courts to make that choice even if they agree with the disposition of a claim for reasons different from those provided by the lower court. *See, e.g.*, *Sullo & Bobbitt, P.L.L.C. v. Milner*, 765 F.3d 388, 392 (5th Cir. 2014) (per curiam) ("We are not limited to the district court's reasons for its grant of summary judgment and may affirm the district court's summary judgment on any ground raised below and supported by the record."); *Georgia-Pac., LLC v. Fields*, 748 S.E.2d 407, 412 (Ga. 2013) ("[A] grant of summary judgment must be affirmed if it is right for any reason, whether stated or unstated in the trial court's order.") (alteration in original) (quotation marks omitted)). To be sure, if a court of appeals does agree with the lower court's reasoning, it may say so. *See, e.g.*, *Edwards v. Scott*, 218 F.3d 744, 744 (5th Cir. 2000) (per curiam) ("We affirm for the reasons given by the trial court."); *United States v. Hershberger*, 83 F.3d 434, 434 (10th Cir. 1996) ("We AFFIRM for the reasons given by the district court."); *United States v. A 1985 Cadillac Fleetwood, VIN No. 1G6CB6989F4299723*, 9 F.3d 109, 109 (6th Cir. 1993) (per curiam) ("[W]e affirm for the reasons given by the district court in its opinion. . . ."). But unless they do,

federal courts do not assume that summary affirmances show approval of lower courts' reasoning.

"It makes no sense, and would run counter to principles of federalism and comity, to constrain state courts in their use of summary affirmances in a way that" this Court and other federal courts of appeals do not. J.A. 321. The federal approach to summary affirmances is just as important for busy state appellate courts concerned with preserving their case-law tradition while also disposing of hundreds or thousands of cases a year. *See Richter*, 562 U.S. at 99 ("The issuance of summary dispositions in many collateral attack cases can enable a state judiciary to concentrate its resources on the cases where opinions are most needed."). There is no good reason to treat all state-court summary affirmances exactly the opposite of how this Court and federal courts of appeals generally do.

3. *Ylst*'s narrow presumption about state procedural bars does not support importing a lower state court's specific reasoning into the last state-court merits decision.

Wilson makes *Ylst v. Nunnemaker* the foundation of his "look through" presumption, Br. 20, but it cannot hold the weight Wilson would have it bear.

Decided years before Congress passed AEDPA, *Ylst* addressed a different issue created by summary

state-court decisions: how federal courts should interpret a last state-court decision that does not explain whether it denied a claim on procedural or merits grounds. For reasons of comity and federalism, a federal court sitting in habeas will not review any claims that state courts rejected based on a petitioner's failure to meet a state-law procedural requirement. *Coleman*, 501 U.S. at 729-32. But a higher state court can lift a state procedural bar imposed by a lower state court by reaching the merits of a claim that a lower court found procedurally barred. *Harris v. Reed*, 489 U.S. 255, 263 (1989). Thus, determining whether a summary state-court decision denies a claim on merits or procedural grounds determines whether a federal habeas court can review the claims before it at all.

This Court came up with a narrow, judge-made test to help make that determination: "Look[] through" the summary state-court decision to see whether a previous state court had rejected the claim on procedural or merits grounds. *Ylst*, 501 U.S. at 804. If the previous court reached the merits, presume the later state court did not find the claim procedurally barred. *Id.* at 803. If the previous court identified a procedural bar, presume that the later state court "did not silently disregard that bar." *Id.*

Ylst still serves its original function post-AEDPA because AEDPA did not disturb the rule against disregarding state-law procedural bars, and *Ylst* still helps federal habeas courts determine whether they can review a claim under § 2254. *See* 28 U.S.C. § 2254(a), (d).

For several reasons, however, *Ylst*'s narrow presumption about how state courts treat procedural bars does not support Wilson's much broader presumption that state appellate courts silently adopt lower courts' specific reasoning by issuing summary decisions.

First, AEDPA forecloses it. *Ylst* approved a judge-made presumption for applying a "prudential" rule. *Dretke v. Haley*, 541 U.S. 386, 392-93 (2004). But even an eminently logical or pragmatic judge-made presumption cannot justify ignoring a statutory limit on the scope of habeas corpus. *See Felker v. Turpin*, 518 U.S. 651, 664 (1996) ("[J]udgments about the proper scope of the writ are 'normally for Congress to make.'" (quoting *Lonchar v. Thomas*, 517 U.S. 314, 323 (1996)); *McQuiggin v. Perkins*, 133 S.Ct. 1924, 1938 (2013) (Scalia, J., dissenting). Nothing in AEDPA permits federal courts to review only "the last reasoned state court decision" (Br. 38) as a proxy for reviewing the "last state-court adjudication on the merits" that is the sole focus of § 2254(d)'s deferential review. *Greene*, 565 U.S. at 39-40. Much less does § 2254 authorize federal courts to grant habeas relief just because a lower court's reasoned opinion unreasonably applies or determines the relevant law or facts, which "looking through" would permit. However pragmatic an expanded version of *Ylst*'s "look through" presumption might appear, AEDPA does not allow it.

Second, Wilson's presumption that state-court summary decisions silently adopt lower state-court opinions is not an accurate one. This Court rejected the competing presumption in *Ylst* for just that reason: In

the circumstances where the choice would matter—where a state court had "expressly relie[d] upon [a] procedural bar"—Nunnemaker's proffered presumption would have "interpret[ed] the [summary] order as rejecting that bar and deciding the federal question on the merits," "a most improbable assessment of what actually occurred." *Ylst*, 501 U.S. at 803-04 (Nunnemaker's presumption assists with "administrability" but only "at the expense of . . . accuracy"). Wilson's presumption is similarly unsound: In cases where both reasonable and unreasonable bases could have supported a higher state court's summary merits decision, it presumes the court chooses the unreasonable basis every time. And in all cases, it treats summary affirmances opposite how this Court and federal courts generally do. Particularly in the federal habeas context, the more accurate presumption is the one mandated by AEDPA and *Richter*: that higher state courts know and follow the law and have denied relief on a reasonable basis if one exists. *See Cannedy*, 733 F.3d at 801-02 (O'Scannlain, J., dissenting from denial of rehearing *en banc*).[6]

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[6] Wilson's presumption would cause particular inaccuracy if new law or facts were introduced between the lower state court's decision and the last one. Such law and facts could be considered on federal habeas review because the law and record against which a state-court decision is measured close when the "last state-court adjudication on the merits" is rendered. *Greene*, 565 U.S. at 40; *see Pinholster*, 563 U.S. at 182. But Wilson's presumption pretends an earlier-in-time opinion provides the reasons for a later-in-time summary merits decision, which requires assuming that the later court simply ignored new law or facts

Third, it is at the very least incongruous to rely on *Ylst*'s presumption in the way Wilson would. *Ylst*'s presumption that summary state-court decisions do not silently lift state procedural bars preserved a prudential constraint on federal habeas relief that is "grounded in concerns of comity and federalism." *Coleman*, 501 U.S. at 750 (recognizing "the important interest in finality served by state procedural rules, and the significant harm to the States that results from the failure of federal courts to respect them"). Employing that same presumption to conduct substantive § 2254(d) review would have the opposite effect: It would expand federal courts' power to grant habeas relief based on lower state courts' reasoning rather than requiring a showing that the last state-court merits decision rests on an unreasonable basis—aggravating, rather than ameliorating, the "intru[sion] on state sovereignty" caused by federal habeas review. *Richter*, 562 U.S. at 103.

By contrast, the approach required by § 2254(d) and demonstrated in *Richter* falls neatly in line with the principles of federalism that *Ylst* promotes. That

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introduced between those two decisions. This is not merely hypothetical: a Ninth Circuit panel applying Wilson's presumption recently affirmed a grant of habeas relief after expressly "test[ing] the reasonableness of the [lower state court's] decision against evidence not presented until the case subsequently went to the California Supreme Court." *Cannedy v. Adams*, 706 F.3d 1148, 1167 (9th Cir. 2013) (Kleinfeld, J., dissenting); *see also id.* at 1156. This temporal problem disappears if the federal court instead reviews the "last state-court adjudication on the merits"—*i.e.*, the same "decision" that marks the closure of the record (*Pinholster*) and the law (*Greene*). *See Cannedy*, 733 F.3d at 801.

approach gives state judicial systems the benefit of the doubt by presuming that higher state courts recognize unreasonable bases for denying relief and instead rely on reasonable ones, if any exist. Wilson's approach may borrow *Ylst*'s "look through" mechanics, but *Richter* better reflects its animating principles.

One final point. This Court explained its choice of presumption in *Ylst* by quoting a "maxim" that "silence implies consent, not the opposite." 501 U.S. at 804. But context constrains that malleable adage. *Ylst* was concerned with determining the grounds of the last state-court decision—federal-merits or state-procedural—not ascertaining its specific reasoning. In that context, silence may well imply "consent," at least in the sense that a higher state court's summary affirmance of a decision finding a procedural default likely honored that procedural bar. But that is a far cry from Wilson's suggestion that a summary affirmance implies adoption of every bit of a lower court's specific reasoning in its entirety, and irrespective of any infirmities. Indeed, it is hard to believe the *Ylst* Court was suggesting that, because this Court has consistently rejected that very interpretation of its own summary affirmances—including less than a year after it decided *Ylst*. *See Wis. Dep't of Rev. v. William Wrigley, Jr., Co.*, 505 U.S. 214, 224 n.2 (1992) (summary dispositions affirm only the judgment below "and cannot be taken as adopting the reasoning of the lower court" (citing *Anderson v. Celebrezze*, 460 U.S. 780, 784 n.5 (1983))). Whatever the conceivable reach of *Ylst*'s "maxim," this Court should not

mandate treating state courts' summary affirmances any differently than its own.[7]

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Wilson framed the question presented in this case as whether *Richter* "silently abrogate[d] the presumption set forth in *Ylst*." Pet. i. By now it should be clear that this is the wrong question. By their own terms, *Ylst* and *Richter* play distinct roles in § 2254 review. *Ylst* shows federal habeas courts how to discern whether a summary state-court decision is a reviewable merits decision; *Richter* shows them how to conduct substantive review of summary merits decisions under § 2254(d). When summary state-court decisions are preceded by a lower state-court opinion, federal habeas courts must first apply *Ylst* to determine whether the last state-court decision is a reviewable decision "on the merits" of a federal claim. *See, e.g.*, *Richter*, 562 U.S. at 99-100; J.A. 316. If it is, courts then must review that last state-court decision on the merits as *Richter* demonstrated, whether or not a lower state court has

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[7] Justice Ginsburg (joined by Justice Kagan) suggested in a concurral that *Ylst* should be expanded in a way similar to what Wilson proposes because "[t]here is no reason not to 'look through' even summary merits decisions to determine the particular reasons why the state court rejected the claim on the merits." *Hittson v. Chatman*, 135 S.Ct. 2126, 2128 (2015) (Ginsburg, J., concurring in denial of certiorari). As explained above, the text of AEDPA and its animating principles provide strong reasons not to extend *Ylst*'s pre-AEDPA judge-made presumption about state procedural bars to substantive habeas review under AEDPA.

issued an opinion. This is the order of operations permitted by the text of § 2254(d) and most consistent with AEDPA's animating principles, *Ylst*, and *Richter*.

D. This Court has not required "looking through" a later summary state-court merits decision to review only a lower state court's reasoning.

A central feature of Wilson's argument is that this Court has endorsed his expansive vision of *Ylst*. *See, e.g.*, Br. 25-28. That is not so. Although this Court has used *Ylst*'s "look through" tool in § 2254(d) cases outside the context of preserving state procedural bars, it has not applied it in a way that is inconsistent with AEDPA or *Richter*. Properly understood, this Court's cases neither endorse his rule nor are inconsistent with the proper approach to reviewing summary decisions under AEDPA and *Richter*.

First, Wilson cites cases where this Court has "looked through" a higher state court's summary denial of discretionary review to find and review the actual last state-court decision on the merits. *See, e.g.*, *Brumfield*, 135 S.Ct. at 2276 (reviewing the Louisiana habeas court's decision instead of the Louisiana Supreme Court's summary denial of a petition for discretionary review); *Donald*, 135 S.Ct. at 1377 (reviewing the Michigan Court of Appeals decision instead of the Michigan Supreme Court's denial of discretionary review); *Johnson*, 568 U.S. at 304 (reviewing the California Court of Appeal's decision instead of the California

Supreme Court's summary denial of discretionary review).[8] Those cases do not aid Wilson's cause because they do not implicate the question how to review a summary *merits* decision. When state courts with certiorari-style discretion to review an appeal decline to do so, it is a decision "not to decide at all," not a decision "on the merits" reviewed under § 2254(d). *Greene*, 565 U.S. at 40; *see also Johnson*, 568 U.S. at 302-03 (a state court adjudicates a claim on the merits by reviewing and passing on its substance). In such a case, a lower state court's merits decision, not the later denial of review, will be the last state-court adjudication on the merits subject to § 2254(d) review. It is appropriate for a federal habeas court to look past later, non-merits state-court decisions to identify the last state-court decision on the merits. *See* J.A. 328-30.

Second, Wilson points to cases where the Court has upheld state-court denials of habeas relief when a lower state court has not unreasonably applied or determined the relevant law and facts. *See, e.g.*, *Premo*, 562 U.S. at 128-29 (2011); *Woods v. Etherton*, 136 S.Ct. 1149, 1153 (2016) (per curiam). These cases do not help Wilson either, because a court reviewing the last state-court merits decision would do the same thing. A lower state court's opinion explaining why that court *denied* a claim is an obvious source of arguments or theories

[8] In Louisiana, an application for a supervisory writ "rests within the sound judicial discretion" of the state supreme court. La. Supreme Ct. R. X § 1(a). And the Michigan Supreme Court and California Supreme Court also have discretion to grant or deny petitions for review. *See* Mich. Ct. R. 7.303(B); Cal. R. of Ct. 8.500.

that "could have supported" the higher state court's decision. If any of the lower state court's "arguments or theories" reasonably apply and determine the relevant law and facts, a federal court may rely on that opinion as a reasonable basis that could have supported a higher state court's summary merits decision.

Third, the two direct-review cases Wilson points out, *Sears v. Upton*, 561 U.S. 945 (2010), and *Foster v. Chatman*, 136 S.Ct. 1737, 1747 (2016), are inapposite. AEDPA provides the textual limits that foreclose Wilson's "look through" requirement for review of summary merits decisions under § 2254(d), but AEDPA does not apply to cases on direct review. Further, while any federal court's review of a state court's decision implicates principles of comity, finality, and federalism, neither the extra attention to those principles prescribed by AEDPA's text and context nor the "special costs on our federal system" imposed by federal habeas review are at play on direct review. *Davila v. Davis*, 137 S.Ct. 2058, 2070 (2017).[9]

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[9] Wilson also asserts that ten federal courts of appeals support his approach. Br. 39 n.23. Although lower courts have cited *Ylst* and used its "look through" tool beyond its original context, Wilson cites only one case where a court of appeals appears to have used *Ylst* to cabin its § 2254(d) review to a lower state court's reasoning and grant relief because that opinion was unreasonable. *Grueninger v. Dir., Va. Dep't of Corr.*, 813 F.3d 517, 525 (4th Cir. 2016). Five of the cases Wilson cites involved looking past denials of discretionary review to review the last state-court merits decision. *See Woodfox v. Cain*, 772 F.3d 358 (5th Cir. 2014) (looking past denial of discretionary review, *see* La. Sup. Ct. R. X § 1(a)); *Lint v. Prelesnik*, 542 F. App'x 472 (6th Cir. 2013) (same, *see* Mich. Ct. R. 7.303(B)); *Woolley v. Rednour*, 702 F.3d 411 (7th Cir. 2012)

Finally, *Virginia v. LeBlanc*, 137 S.Ct. 1726 (2017), and *McWilliams v. Dunn*, 137 S.Ct. 1790 (2017), AEDPA cases decided after Wilson filed his merits brief, do not endorse Wilson's theory. For starters, neither decision cites *Ylst* or treats the summary denials of the relevant claims as having silently adopted the lower court's reasoning. And both reflect a search for a reasonable basis that could have supported the denial of relief.

In *LeBlanc*, the Court denied habeas relief because "it was not objectively unreasonable for the state court to conclude that, because the geriatric release program employed normal parole factors, it satisfied *Graham*'s requirement that juveniles convicted of a nonhomicide crime have a meaningful opportunity to receive parole." *LeBlanc*, 137 S.Ct. at 1729. Even assuming the Virginia Supreme Court's later summary denial of the petitioner's claim was a merits decision, that resolution of the claim was appropriate under § 2254(d) and *Richter* because the lower state court provided a reasonable basis that could have supported

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(same, *see* Ill. S.Ct. R. 315(a)); *Martinez v. Hartley*, 413 F. App'x 44 (10th Cir. 2011) (same, *see* Colorado App. R. 49); *Malone v. Clarke*, 536 F.3d 54 (1st Cir. 2008) (same, *see* Mass. R. App. P. 27.1; Mass. Gen. Laws Ann. ch. 211A, § 11). And four denied relief based on lower state-court reasoning that would also, under the approach demonstrated in *Richter*, supply a "reasonable basis" that "could have supported" the last state-court merits decision. *See Rosario v. Ercole*, 601 F.3d 118 (2d Cir. 2010); *Bond v. Beard*, 539 F.3d 256 (3d Cir. 2008); *Worthington v. Roper*, 631 F.3d 487 (8th Cir. 2011); and *Murray v. Schriro*, 745 F.3d 984 (9th Cir. 2014).

the last state-court merits decision. *See Richter*, 562 U.S. at 98, 102; J.A. 326-27.

As for *McWilliams*, the Court's approach is largely consistent with the "no reasonable basis" approach demonstrated in *Richter*. The Court framed the question as "whether the Alabama Court of Criminal Appeals' determination that McWilliams got all the assistance to which *Ake* [*v. Oklahoma*, 470 U.S. 68 (1985),] entitled him was 'contrary to, or involved an unreasonable application of, clearly established Federal law.'" *McWilliams*, 137 S.Ct. at 1798 (quoting 28 U.S.C. § 2254(d)). But the Court did not focus solely on the reasoning of the Alabama Court of Criminal Appeals to answer that question. Instead, the Court reviewed and rejected several potential arguments or theories that could have supported a denial of relief. *See id.* at 1798-99 (rejecting potential arguments that "the conditions that trigger application of *Ake*" were not present, that having the assistance of another psychologist relieved Alabama of its duty under *Ake*, and that "*Ake*'s requirements are irrelevant because McWilliams 'never asked for more expert assistance' than he got"). The Court ultimately concluded that, based on the facts of that case, "Alabama here did not meet even *Ake*'s most basic requirements" for providing expert assistance. *Id.* at 1800. *McWilliams* turned on a determination that no reasonable basis could have supported the decision, not that the lower state court's opinion alone unreasonably applied *Ake*.

E. Georgia's habeas procedures do not warrant a different approach to federal habeas review.

1. The Georgia Supreme Court's summary denial of a certificate of probable cause must be reviewed under the approach demonstrated in *Richter*.

Georgia has set up a two-tiered system for reviewing claims for postconviction relief. The first tier is review in the superior court in the county where the petitioner is detained. Ga. Code Ann. § 9-14-43. That court receives evidence, reviews the pleadings, makes written findings of facts and conclusions of law, and renders a judgment. *Id.* §§ 9-14-48, 9-14-49. Tier two is an appeal to the Supreme Court of Georgia. *Id.* § 9-14-52. If an unsuccessful habeas petitioner applies for a certificate of probable cause to appeal, the superior-court clerk forwards the record and transcript to the Supreme Court. *Id.* If the application was timely filed, the Georgia Supreme Court "consider[s] fully" the record and pleadings to determine whether there is "arguable merit" to any of the issues properly raised in it. *Id.*; Ga. S.Ct. R. 36. If so, the Court conducts further review; if not, the Court denies the application, often in a summary decision. J.A. 312-13.

Reviewing a petitioner's claims under § 2254(d) after the Georgia Supreme Court has summarily denied a certificate of probable cause is straightforward. Because that decision is a denial of claims rather than a denial of discretionary review, it is presumptively the last state-court adjudication on the merits subject to

review under § 2254(d). J.A. 311-12. Thus, review proceeds under two steps: First, apply *Ylst* to ensure that the Georgia Supreme Court's decision is reviewable; if the state habeas court's decision on a claim is based on state-law procedural grounds, the federal court may not review that claim. *See Richter*, 562 U.S. at 99-100 (citing *Ylst*, 501 U.S. at 803). Second, review the claim as required by AEDPA and *Richter* by determining whether the petitioner has met his burden of showing that "no reasonable basis" "could have supported" that "last state-court adjudication on the merits." *Id.* at 98, 102; *Greene*, 565 U.S. at 39.

By no means does this approach to § 2254(d) "ignore," or "exclud[e]" or "outlaw" consideration of the superior court's legal and factual conclusions as Wilson claims. Br. 51, 33, 44. As an initial matter, the federal habeas court still must review that opinion to ensure the Georgia Supreme Court's decision is reviewable under *Ylst*. In addition, and as the *en banc* court of appeals recognized, the federal court can look to the superior court's opinion for arguments or theories that could have supported the Georgia Supreme Court's decision. If the lower court supplied a reasonable one, the inquiry ends. *See* J.A. 326 ("[A] federal habeas court may look to a previous opinion as one example of a reasonable application of law or determination of fact."). In short, proper application of § 2254(d) to the Georgia Supreme Court's summary denial of a certificate of probable cause is not the affront to state courts that Wilson claims, *see* Br. 33-34. Federal habeas courts will

pay careful attention to both tiers of Georgia's postconviction-review system under the proper approach to reviewing summary merits decisions under § 2254(d).[10]

Indeed, Wilson's rule is the one that would pay insult to Georgia's judiciary (and those of other states). His rule effectively requires a federal habeas court to disregard a higher state court's adjudication of the merits of a petitioner's claim and focus only on a lower state court's opinion. This is no small thing; without *any* federal constitutional or statutory basis, Wilson would give federal courts license to ignore sovereign

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[10] Nor does Georgia's "clear error" standard for reviewing the state habeas court's factual findings change the calculus. Wilson claims that because the Georgia Supreme Court reviews habeas factual findings under that standard, it "ensures" that the state habeas court's factual determinations "*will* supply the factual foundation" for the Georgia Supreme Court's analysis. Br. 44. This is little more than a Georgia-specific version of his flawed presumption that higher state courts silently adopt lower courts' opinions when they issue summary decisions, and it is equally infirm. There is little reason to think a denial of a certificate of probable cause *necessarily* means the Georgia Supreme Court accepts all of the state habeas court's factual findings; "clear error" is not an insurmountable bar, and the Georgia Supreme Court has rejected factual findings as clearly erroneous plenty of times. *See, e.g.*, *Washington v. Hopson*, 788 S.E.2d 362, 368 (Ga. 2016); *State v. Martinez*, 729 S.E.2d 390, 392 (Ga. 2012); *Upton v. Parks*, 664 S.E.2d 196, 201 (Ga. 2008). Just as the court may affirm a lower court's decision for different reasons, it may also affirm despite disagreement with some of the lower court's factual findings, *see, e.g.*, *Whatley v. Terry*, 668 S.E.2d 651, 655-56 (Ga. 2008), and there is no reason to think that the court would always (or even usually) issue a reasoned opinion merely to dispute factual findings on the way to affirming the ultimate decision.

states' considered choices about what judicial procedures and structures they will use to adjudicate citizens' constitutional rights. The State of Georgia has implemented a two-tiered structure of review for post-conviction claims that gives its supreme court the final say on the merits of claims that are not procedurally barred. Wilson's approach lets federal courts disregard Georgia's choice and treat the lower state court's opinion as the definitive one for federal habeas review.

At bottom, Wilson's arguments reveal a view of Georgia's habeas procedures that does not reflect legal reality. He claims that when the Georgia Supreme Court denies a certificate of probable cause, federal courts should review the state habeas court's decision because that court did all the work, and the Georgia Supreme Court did not really "scrutinize[]" the petitioner's claims. Br. 42. In other words, his argument necessarily implies that the state habeas court's decision is the *true* last state-court adjudication on the merits to be reviewed under § 2254(d).

But Wilson cannot win that argument. For one thing, he is wrong to suggest that a denial of a certificate of probable cause is a cursory or insufficient review of a claim; the Georgia Supreme Court makes such a decision only after "fully" considering the complete record and transcript. *See* Ga. Code Ann. § 9-14-52. And most importantly, the *en banc* Eleventh Circuit rejected this implicit argument below when it held that the Georgia Supreme Court's denial of a certificate of probable cause is presumptively an adjudication on the merits subject to § 2254(d) review and not a denial of

discretionary review—a holding even the dissenting judges did not contest, J.A. 352 (Jill Pryor, J., dissenting), and with which this Court has agreed, *see Foster*, 136 S.Ct. at 1746 n.2. Absent a state procedural bar, the Georgia Supreme Court's denial of a certificate of probable cause is the last state-court merits decision that must be reviewed under § 2254(d). When that merits decision is unexplained, federal courts must review it under § 2254(d) as they would review the last state-court merits decision in any other state.

2. This Court should not consider Wilson's new argument about the Georgia Supreme Court's "arguable merit" standard.

This Court does not consider questions that have not been raised before or considered by the court of appeals. *Pa. Dep't of Corr. v. Yeskey*, 524 U.S. 206, 212-13 (1998). The Court also only considers questions "fairly included" in the questions presented in the petition for certiorari. S. Ct. R. 14.1(a); *see also, e.g.*, *Yee v. City of Escondido, Cal.*, 503 U.S. 519, 535 (1992).

For both of these reasons, the Court should not address Wilson's argument that the *en banc* court of appeals erred by not "recognizing or accounting for the significance of the [Georgia Supreme Court's] 'arguable merit' standard" in determining whether to grant a certificate of probable cause. Br. 49. Wilson presses this argument for the first time in his merits brief before this Court; he did not raise it before any court below, and none addressed it. Nor did he include it anywhere

in his petition for certiorari. Wilson's only question presented was whether "a federal court sitting in habeas proceedings should 'look through' a summary state court ruling to review the last reasoned decision." Pet. i. Wilson's "arguable merit" argument presents the entirely different question whether the court of appeals should have reviewed his claims under a "less deferential inquiry" that acknowledged the "arguable merit" standard for granting a certificate of probable cause. Br. 44-50. Indeed, Wilson concedes that this question is separate from his question presented by asserting that it "has important implications if the Eleventh Circuit *en banc* majority's holding *is upheld*." Br. 36 n.21 (emphasis added).[11] "A question which is merely 'complementary' or 'related' to the question presented in the petition for certiorari is not 'fairly included therein.'" *Izumi Seimitsu Kogyo Kabushiki Kaisha v. U.S. Philips Corp.*, 510 U.S. 27, 31-32 (1993) (per curiam).

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[11] Wilson includes this new argument again in his petition for certiorari to the court of appeals panel (which reissued its opinion upon remand from the *en banc* court of appeals). That petition is currently pending before this Court. *See Wilson v. Sellers*, No. 17-5562.

CONCLUSION

The judgment below should be affirmed.

Respectfully submitted,

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